

2011 WL 7807396 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

The Estate of Henry C. GIBSON, By and Through Don R. Gibson, Administrator for the
Use and Benefit of the Estate of Henry C. Gibson, and On Behalf of and for the Use and
Benefit of the Wrongful Death Beneficiaries of Henry C. Gibson, Appellant/Cross- Appellee,

v.

MAGNLOIA HEALTHCARE, INC.; Foundation Health Services, Inc.; Unidentified Entities 1 through
10 and John Does 1 Through 10 (as to Arnold Avenue Nursing Home), Appellees/Cross-Appellants.

No. 2010-CA-00741.

April 1, 2011.

Appeal from the Circuit Court of Washington County, Mississippi
Honorable Betty W. Sanders, Circuit Judge
Oral Argument Requested
Civil

Brief of Appellants

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*vi Statement of the Issues

1. Whether the lower court erred in declining to submit the issue of punitive damages to the jury pursuant to [Miss. Code Ann. § 11-1-65](#)?
2. Whether the statutory caps on non-economic damages set forth in [Miss. Code Ann § 11-1-60](#) (2) are unconstitutional?

***vii Statement Regarding Oral Argument**

Appellant requests that oral argument be granted. This case turns on a clear understanding of the record and applicable jurisprudence involving the constitutionality of [Miss Code Ann. § 11-1-60](#) (2). A thorough discussion of the record and constitutional provisions with the Court will be beneficial in explaining the Appellant's position on the important issues raised.

***1 Statement of the Case**

Nature of the Case

The instant case is a nursing-home **abuse**-and-neglect case. Appellant is the administrator of the estate of Henry C. Gibson representing the estate and Mr. Gibson's wrongful death beneficiaries (hereinafter collectively the "Estate"). Appellees are the owners and operators of Arnold Avenue Nursing Home where Mr. Gibson resided and incurred injuries resulting in his death (hereinafter collectively "Magnolia").

The instant appeal arises after a Mississippi jury awarded compensatory damages in favor of the Appellant after an eleven-day trial. This appeal questions the lower court's subsequent dismissal of the Estate's claim for punitive damages with prejudice and determination that the conduct of Magnolia was not sufficiently egregious or offensive to allow the case to be submitted to the jury on the question of punitive damages. As will be set forth in detail below, reversal of the lower court's dismissal with prejudice of the Estate's claim for punitive damages is in order.

After the jury's award of compensatory damages, the lower court reduced the award for non-economic damages pursuant to the statutory limitations set forth in [Mississippi Code Annotated § 11-1-60\(2\)\(a\)](#). The instant appeal examines the constitutionality of this statutory cap on non-economic damages. As will be set forth in detail below, the cap on non-economic damages violates the Estate's rights under the Mississippi Constitution, necessitating the reinstatement of the jury's verdict in its full amount.

Course of the Proceedings Below

The Estate filed its complaint against Magnolia on August 25, 2004, alleging negligence, medical malpractice, malice and/or gross negligence, fraud, and breach of ***2** fiduciary duty, seeking compensatory and punitive damages for survival and wrongful death claims. (R. 3-33) ¹. Following the usual pretrial course, the trial of this matter commenced on August 31, 2009, and ended on September 10, 2009.

Mr. Gibson was totally dependent upon Magnolia for every aspect of his care for he was frail of both body and mind. (T. 178; 247; 252). Because of his frailty, he was forced to endure mistreatment and pain while he suffered from: a significant fractured right humerus caused by a severe fall and/or drop that was not timely treated and ignored for several weeks; hemothorax that caused respiratory problems; severe dehydration and malnutrition leading to [kidney failure](#); contractures; the development of several infected pressure sores requiring painful [debridements](#); significant weight loss; and several falls causing injuries and bruising during his approximate two-year residency at Arnold Avenue Nursing Home. (T. 178 -206; 419-423; 458 -511; 542; 686-749)

During the trial, the Estate presented evidence demonstrating that there existed a pattern of short-staffing at the nursing home directly affecting the staffs ability to provide Mr. Gibson with proper care and forcing him to live in deplorable conditions. (T.

247 -257; 304-320). The evidence further demonstrated that the nursing home repeatedly lacked the basic supplies necessary to provide Mr. Gibson with proper care. (T. 305-306). The nursing home lacked even the most basic supplies for Mr. Gibson's hygiene such as towels, pads, and soap. Id. The Estate also presented evidence of fraudulent documentation by the nursing home staff in completing residents' charts; a practice that was mandated by Magnolia in order for staff to receive paychecks. (T. 256-289; 294 - *3 296). There was evidence that the staff allowed Mr. Gibson to suffer from a broken bone after a fall for four to six weeks without treatment, documentation, or acknowledgement. (T. 692 - 696). This same traumatic event caused a condition known as [hemothorax](#) which is a collection of blood and fluid around the lungs. The [hemothorax](#) injury also went undocumented, untreated, and unacknowledged for weeks. (T. 706-707).

Finally, the Estate's counsel presented the lower court with a survey conducted by the State of Mississippi in November 2001, during Mr. Gibson's residency, citing the nursing home for the very deficiencies and injuries that plagued Mr. Gibson. (T. 1752 -1758; R. 1592-1597). As such, Magnolia had notice and knowledge that residents were repeatedly suffering at the nursing home but did nothing to remedy the situation. Instead, Magnolia turned a blind eye to the injustices that this **elderly** and frail man had to endure in order to avoid responsibility and increase profits.

At the close of the case for liability, Magnolia moved for a directed verdict which was denied by the lower court. (T. 1582 -1590). Thereafter, the jury returned a verdict for the Estate in the amount of \$1,500,000.00, including \$75,000.00 for permanent disfigurement. (T.1744; 1751 - 1752). Following the procedural requirements of [Miss. Code Ann. § 11-1-65](#), the lower court commenced an evidentiary hearing to determine whether the trier of fact might consider punitive damages. (T. 1752-1774; R.E. 3; R. 1402-1404). The Estate argued that, in light of the evidence presented, a reasonable hypothetical trier of fact could find gross disregard for Mr. Gibson's rights (T. 1752-1759). Disagreeing with the Estate's position, the lower court denied the Estate's request for submission to the jury for consideration of punitive damages. (T. 1771 1776; R.E. 3, 5; R. 1402-1404).

On October 9, 2009, the lower court entered a Final Judgment reducing the *4 damages awarded by the jury from \$1,500,000.00 to the sum of \$575,000.00, consisting of \$500,000.00 for non-economic damages and \$75,000.00 for permanent disfigurement, pursuant to [Miss. Code Ann. § 11-1-60](#). (R. 1405-1407; R.E. 2).

On October 26, 2009, Magnolia moved for Judgment Notwithstanding the Verdict as to which the Estate filed a response and Magnolia filed a rebuttal. (R. 1408-1459). The lower court heard oral arguments in support of the motion on January 10, 2010. On April 1, 2010, the lower court entered an Order denying Magnolia's Motions for Directed Verdict finding that "the jury's verdict was supported by substantial evidence, and their verdict must stand." (R.1469-1470; R. E. 4).

On April 29, 2010, the Estate filed a Notice of Appeal challenging the lower court's denial of submission to the jury on the issue of punitive damages and challenging the constitutionality of [Miss. Code Ann. § 11-1-65](#) pursuant to which the lower court reduced the non-economic damages awarded by the jury. (R. 1471 - 1480). Subsequently, on May 3, 2010, Magnolia filed a Notice of Appeal challenging the lower court's order denying their Motions for Judgment Notwithstanding the Verdict, the Final Judgment, and the lower court's denial of their Motions for Directed Verdict as to Plaintiffs claims. (R. 1431 - 1505).

Statement of Facts

On June 11, 2001, Henry Gibson suffered a [stroke](#) leaving his right side weak and affecting his ability to communicate and swallow. (T. 177 -178). His family was told that he needed rehabilitation at a skilled nursing facility prior to returning home. (T. 178). As a result, Mr. Gibson was admitted to Arnold Avenue Nursing Home. Henry C. Gibson was a resident of Arnold Avenue Nursing Home, a skilled nursing facility owned, operated, and managed by Magnolia from June 2001, until his death on January 26, *5 2003. (R. 3 - 33). During his residency, Mr. Gibson suffered severe and painful injuries including: a significant fractured right humerus caused by a severe fall and/or drop that was not timely treated and ignored for several weeks; hemothorax that caused respiratory problems; severe dehydration and malnutrition leading to [kidney failure](#); contractures; the development of several infected pressure sores requiring painful [debridements](#); significant weight loss; and several falls causing injuries and bruising; all of which significantly contributed and/or caused Mr. Gibson's death. (T. 178-206; 419; 686-749). Additionally,

Mr. Gibson was forced to live in deplorable conditions and was not even provided with basic care such as hygiene and sanitary care. (T. 249, 252).

At the time of his admission, Mr. Gibson required total care and was completely dependent upon Magnolia and its employees for every aspect of his care due to a recent [stroke](#) causing left sided weakness. (T. 247; 252). He required assistance with: eating, drinking, toileting, bathing, and moving from one place to another. Mr. Gibson was not able to do these things for himself. This much is without dispute in this case.

What is also clear is that sufficient staff was required to provide the care that Mr. Gibson needed. The record reveals, however, that sufficient staff was not provided by Magnolia, despite Magnolia being on notice of the short-staffing problems prevalent at the nursing home. (T.247-257; 304-320). Caregivers from various shifts and various time periods testified in this case. *Id.* These caregivers uniformly testified that they could not perform their duties in the nursing home because they had more residents to care for than they had time to provide the care. The result was that residents were not fed, not provided with water, not turned and repositioned when they were immobile, not cleaned after a period of incontinence until brown rings of dried urine and feces formed on their sheets and bodies, and not given range-of-motion exercises to prevent *6 contractures. *Id.*

These same caregivers testified that Mr. Gibson suffered from these same effects of lack of staff. For example, Jacqueline Rollins, a certified nursing assistant that provided care to Mr. Gibson, testified that “many times” the nursing home was “short of staff.” (T. 247 - 248). As such, Ms. Rollins was “not able to make rounds every two hours” and could not “provide the care for the patient that they would normally have.” (T. 248). It was during these rounds that the aides would ensure the residents had water and ice, would reposition them to avoid skin breakdown, provide snacks, and check vitals. (T. 246). Due to shortage of staff, Ms. Rollins was only able to make two rounds per shift; this meant that Mr. Gibson was not turned or repositioned nor checked on two times per shift. (T. 248-249). Ms. Rollins testified that when they were short of staff, she did not have the time to clean a patient like he should have been cleaned. (T. 249). For instance, although Mr. Gibson's bed would repeatedly be drenched in milk resulting from his PEG tube being pulled out by his roommate, she would only have time to change the linens and not actually clean Mr. Gibson when he soiled himself. (T. 249; 252). Because she was only able to perform two rounds per shift because of staffing conditions, Ms. Rollins was not able to provide Mr. Gibson with the care that he needed. (T. 254). The nursing home was so short-staffed that Ms. Rollins had to help other staff members when caring for other residents, despite not recording the care in the chart, a practice known as floating. (T. 255 - 256). The only time the facility was fully staffed was during the evaluations by the State of Mississippi surveyors. (T. 257). Ms. Rollins testified that her supervisors were on notice of the short-staffing but the situation never improved. (T.258-259).

*7 Ms. Rollins also testified that the odor of feces was so overwhelming that it hit you upon entrance and occurred as a result of failing to keep the residents clean and changed, and that she had informed the LPN in charge that Mr. Gibson's PEG tube was repeatedly pulled out by his roommate affecting Mr. Gibson's nutrition, and she regularly noticed that his bed rails were down when he had already been identified as a fall risk requiring them to be up. (T. 250 - 256). Finally, Ms. Rollins confirmed the fraudulent documentation prevalent within the nursing home. Ms. Rollins was specifically instructed by her supervisor to fill out papers indicating that she provided care to a resident even though she had not. (T. 258 - 289). Additionally, employees would sign for other employees in the nursing home chart if they had not done so. (T. 294 - 296).

Viola Bryant, another certified nursing assistant that provided care to Mr. Gibson during his residency, confirmed the problems of short-staffing at the nursing home. (T. 304). The short-staffing affected her ability to provide good care to Mr. Gibson (T. 305). There were times when she would find Mr. Gibson wet and dirty because of the short-staffing. (T. 307). Ms. Bryant also testified that the nursing home did not have sufficient supplies, such as pads, towels, soap, or powder, making it difficult for her to provide the care that Mr. Gibson needed. (T. 305 - 306). She also reported these staffing issues to her supervisor. (T. 306 - 307). But these issues were not resolved. (T. 306). “[W]orking short-staffed,... you didn't have enough time to get around to everybody in a timely manner.” (T. 306). The short-staffing affected Ms. Bryant's ability to provide Mr. Gibson with adequate and appropriate health care. (T. 308). She had to help other employees because of the shortage. (T. 319). In fact, Ms. Bryant left her employment at the nursing home because “they were short all the time and there wasn't enough workers.” (T. 319 - 320).

***8** What is also beyond dispute is that failing to clean a resident's skin, turn and reposition him, and to provide him with sufficient nutrients and adequate liquids causes skin breakdown. Failing to provide food results in malnutrition. Failing to provide water results in dehydration. Failing to perform range-of-motion exercises causes contractures in an immobile resident. Failing to implement fall precautions for a fall-risk resident certainly provides the opportunity for a resident to fall and fracture bones. Henry C. Gibson suffered from each of these injuries.

Evidence of Magnolia's failures, however, was not limited to these caregivers. Testimony from the Estate's expert, Dr. Leonard Williams M.D., identified and established six areas where Magnolia breached the standard of care relating to Mr. Gibson. Those areas include: nutrition, hydration, skin care, range of motion, falls, and infections. A brief examination of each is useful.

As for nutrition and hydration, Dr. Williams testified that Magnolia failed to meet Mr. Gibson's basic needs. (T. 715 - 716; 728 - 731). This failure resulted in a drastic weight loss, dehydration resulting in [renal failure](#) and an overall breaking down of his system. It denied his body the nutrients and liquids necessary to prevent skin breakdown and to ward off infection. (T.715 - 717; 728 - 729). "[H]is dehydration was the fault of the staff at the nursing home because they had the duty to provide him with appropriate fluids to sustain life and well-being. And he had a feeding tube, so there wasn't any difficulty with getting the fluid into Mr. Gibson. It was a matter of just giving it to him." (T. 716). According to Dr. Williams, Mr. Gibson became malnourished "because the [staff] didn't give him the nutrition he needed." (T. 729). These failures were the basis of his overall decline and eventual death. (T. 740 - 742; 745). This failure is particularly difficult to understand given that Mr. Gibson was fed through a tube ***9** for much of his residency. (T. 716). According to multiple experts, Mr. Gibson would not have become dehydrated or malnourished had Magnolia's staff provided him with the hydration and nutrition that he required. (T. 716; 729). The Estate's nursing expert, Cynthia Clevenger, R.N., shared Dr. Williams' opinions. (T.419-423; 419 -459).

Dr. Williams also opined that the nursing staff failed to provide appropriate care and assessment to prevent Mr. Gibson from developing painful pressure sores. The nursing staff failed in their responsibility to turn and reposition Mr. Gibson. As a result, he developed several infected pressure sores. (T. 731 - 733; 738 - 739; 746). The sores resulted, quite simply, from poor nutrition and hydration, failing to turn and reposition Mr. Gibson and failing to clean his body after periods of incontinence. Some required [debridement](#). (T. 476 - 490; 732 - 739). With respect to the prevention of pressure sores, Magnolia failed to follow their own care plans, policies and procedures, and violated state and federal regulations. (T. 450-497; 542 - 547). Mr. Gibson's own caregivers testified that due to short-staffing they were unable to turn and reposition him in a timely fashion. (T.247 - 259; 304 - 320). Needless to say, Mr. Gibson suffered excruciating pain as a result. The Estate's nursing expert, Cynthia Clevenger, R.N., shared Dr. Williams' opinions. (T.460 - 491).

Similar evidence was presented with respect to contractures. (T. 492 - 511; 739 - 740). Contractures occur when the limbs contract from lack of use. They are prevented by performing simple range of motion exercises with residents. These exercises were not adequately preformed for Mr. Gibson causing him to contract into a fetal position. (T. 492 -511; 739 - 740). Notably, Magnolia did not offer any evidence at trial to contradict the Estate's experts on this issue.

***10** Finally, there was Mr. Gibson's fractured right humerus, a significant bone fracture, and [hemothorax](#) that caused him respiratory problems. The evidence was undisputed that Mr. Gibson could not get out of bed without assistance. (T.513). The evidence was also undisputed that the side-rails on Mr. Gibson's bed should be up at all times, and that Mr. Gibson's side-rails were left down previously. (T. 250-256; 512).

Dr. Leonard Williams also agreed with the radiologist that significant trauma caused Mr. Gibson's fractured arm. (T. 686 - 714). Dr. Williams opined that the [hemothorax](#) sustained by Mr. Gibson was caused by the same severe trauma that had caused the fractured arm. (T. 686; 694). The medical testimony and records introduced at trial presented overwhelming evidence that Mr. Gibson sustained these injuries during a window of time where he was in no other place except Arnold Avenue Nursing Home. (T. 696 - 697; 728).

Dr. Williams testified that the lack of calcification present in the X-ray of Mr. Gibson's arm taken when he arrived at the hospital meant that the fracture occurred within four (4) to six (6) weeks of December 31, 2002. (T. 692 - 696). Given the lack of swelling or bruising on Mr. Gibson's arm when he arrived at the hospital and prior to the X-ray, the traumatic event that caused the fracture did not occur at or on the way to the hospital, but was at least two (2) weeks old and at most six (6) weeks old. (T. 692 - 696). In the midst of this timeframe, on November 22, 2002, a nursing document identified swelling to Mr. Gibson's right hand and fingers, and also noted he did not extend his arm. (T.687). There was no investigation by the nursing staff to determine the source of this injury. (T. 687 - 688).

The testimony and records demonstrate that Mr. Gibson also suffered from the hemthorax for some time, at least several weeks, (T. 706 - 707), once again, placing *11 the timing of the trauma at the Magnolia facility. Dr. Williams testified that, more likely than not, both of the injuries were due to significant trauma, such as a fall or being dropped to the floor, and that the injuries were sustained at the nursing home. (T. 686). Whether Mr. Gibson was dropped by the staff or the side-rails were left down (as Mr. Gibson could not get out of bed unassisted), Magnolia was negligent. (T. 716).

According to medical records, Dr. Gamble was also of the opinion that Mr. Gibson suffered from a traumatic episode at Arnold Avenue Nursing Home that resulted in a [spiral fracture](#) of his right humerus and [hemothorax](#). (T. 711).

Therefore, the evidence presented at trial provided the jury with a substantial basis to find that Magnolia's negligence caused or significantly contributed to Henry C. Gibson's injuries and death. (T. 740 - 742; 745). Moreover, the Estate's nurse expert opined:

I feel like that Mr. Gibson suffered avoidable and preventable medical conditions at Arnold Avenue because they did not - - they deviated from the standards of care for nursing, for state and federal regulations, their own policies and procedures. I feel like that it was egregious and outrageous. I feel like Mr. Gibson deserved better care. He had certain medical conditions. He was just 71 years old when he came in. I just feel like that Arnold Avenue showed a blatant disregard for his health and well-being. He did not receive the care that he deserved.

(T. 521; 542 -543).

On this record, the jury returned its verdict. Taken in its totality, the evidence reveals a nursing home that was dangerously short of staff and a resident, Henry C. Gibson, whose very existence depended on care from adequate staff. Mr. Gibson was not fed or given water. He was not cleaned after episodes of incontinence. He was not turned and repositioned or given range-of-motion exercises. Staff did not ensure that fall precautions were taken to ensure Mr. Gibson, previously identified as a fall-risk, was safe from falls. Shockingly, Mr. Gibson was left to lay in excruciating pain for several *12 weeks after a significant traumatic event fracturing his arm and causing blood and fluid in his lungs. The result was terrible sores, contractures to the fetal position, starvation, dehydration, excruciating pain resulting from an untreated significant bone fracture and [hemothorax](#), and death.

The record evidence further demonstrated that Magnolia was put on notice of the conditions, including short-staffing, at Arnold Avenue Nursing Home. Caregivers testified that short-staffing was a constant problem at the nursing home. They were unable to provide the care that Mr. Gibson needed because of short-staffing. They brought these issues to upper management but nothing was resolved. The conditions were so bad that a caregiver had to leave her employment at the nursing home because she could not adequately do her job.

Moreover, after the return of the jury's verdict for compensatory damages in favor of the Estate, counsel presented the lower court with a survey conducted by the State of Mississippi, during Mr. Gibson's residency. (T. 1757 - 1758; R. 1592-1597). The survey demonstrates that Magnolia was on notice of residents suffering from the very same injuries that Mr. Gibson suffered. That is, the nursing home was cited for failing to provide sufficient fluid intake to maintain proper hydration and health and to ensure that residents received food in the amount specified. Id. Therefore, Magnolia was put on notice that there were issues at Arnold Avenue Nursing Home that required a change. However, despite the citations by the State of Mississippi and repeated complaints by the staff, Magnolia failed to take any steps to ensure that its residents, including Mr. Gibson, were safe from

harm. Instead, Magnolia chose to turn a blind eye for the sake of profits that came at the expense of the frail and **elderly** who depended on Magnolia for their most basic needs.

***13** On this record, the jury should have been allowed to consider the Estate's claim of punitive damages. A reasonable hypothetical trier of fact could find gross disregard for Mr. Gibson's rights in light of the deplorable conditions he was forced to live in such as laying in his own feces and urine, rampant staffing problems that went uncorrected, fraudulent documentation, failure to provide even the most basic needs of fluid and nutrition, and failure to timely treat a fractured arm and **hemothorax**, causing Mr. Gibson to be in agonizing pain for several weeks. Magnolia was made aware of these conditions and failed to take any action to assist this totally dependent human being. Magnolia's actions (or deliberate inaction) certainly constituted a complete disregard of human life and reckless indifference for the rights of Mr. Gibson for whom the nursing home was being compensated for every detail of sustaining his life in the most dignified and comfortable way possible. The lower court's ruling precluding the submission of the issue of punitive damages to the jury was an **abuse** of discretion.

Summary of the Argument

The jury's verdict in this case must be affirmed. However, the lower court's dismissal of the Estate's claim for punitive damages with prejudice must be reversed.

As set forth above, Mr. Gibson came to Magnolia's nursing home needing care, and Magnolia promised to give it. Instead, Magnolia understaffed the facility so badly that he languished in urine and feces, suffered starvation and dehydration, endured painful contractures and pressure sores, suffered in agonizing pain for weeks due to a fractured arm and hemothorax, and finally died. Magnolia was aware of these deficiencies and did nothing to cure them. The Estate's experts testified to the harm caused by this want of care including malnutrition, dehydration, severe contractures, infected significant pressure sores, infections, failure to timely treat serious bone ***14** fractures and **hemothorax** for weeks, and death. The experts testified that these injuries were caused by Magnolia's negligence. These facts are "reprehensible" and warrant both compensatory and punitive damages.

Additionally, the statutory caps on non-economic damages set forth in [Miss. Code Ann. § 11-1-60](#), pursuant to which the lower court reduced the jury's award, violates the Estate's rights under the Mississippi Constitution. Accordingly, the jury's full verdict must be reinstated.

Argument

1. The Lower Court Erred in Failing to Submit to the Jury the Estate's Request for Punitive Damages

The award of punitive damages is in the nature of a punishment for wrongdoing and an example so that others may be deterred from the commission of such wrongs and the public property protected. *See, e.g., National Heritage Realty, Inc. v. Estate of Boles*, 947 So.2d 238, 246 (Miss. 2006). This Court has long recognized a plaintiff's right to recover punitive damages in order to punish the wrongdoer and to deter others from wanton or malicious conduct so that the public may be protected. *Id.* "When deciding to submit the issue of punitive damages to a trier of fact, the trial court looks at the totality of the circumstances, as revealed in the record, to determine if a reasonable, hypothetical trier of fact could find either malice or gross neglect and reckless disregard." *Mariner Health Care, Inc. v. Edwards*, 964 So.2d 1138, 1148 (Miss. 2007). The trial court's determination will not be overturned absent an **abuse** of discretion. *Id.*

The Mississippi Legislature prescribed the procedure for determining whether the issue of punitive damages should be submitted to the jury in [Miss. Code Ann. § 11-1-65](#). It provides as follows:

(1) In any action in which punitive damages are sought:

***15** (b) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount, before addressing any issues related to punitive damages.

(c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.

[Miss. Code Ann. §11-1-65](#).

The lower court “must decide whether the party requesting punitive damages has introduced evidence sufficient to warrant a punitive damages instruction.” *Lewis v. Hiatt*, 683 So.2d 937, 942 (Miss. 1996). Refusal to submit punitive damages issue to a jury is proper if the appellate court, viewing evidence in light most favorable to the plaintiff and allowing all reasonable favorable inferences, can say that no hypothetical jury could find in plaintiffs favor. *Sentinel Industrial Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 74 So.2d 954, 971 -72 (Miss. 1999).

In *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437 (Miss. 2000), a verdict for retaliatory discharge and tortious breach of contract warranted a punitive damages award by the jury because a manager **abused** her position towards two employees. In *McCorkle v. McCorkle*, 811 So.2d 258, 271 (Miss. Ct. App. 2001), the defendant's reckless disregard of his father's right to privacy, his attempt to commit his father, and his disregard for the law, supported a “finding of malice and reckless disregard for [the father's] rights by clear and convincing evidence.” *Id.* at 271. This Court affirmed the verdict in favor of the father and reversed and remanded on the issue of punitive damages, stating that “[a] jury instruction for punitive damages should have been granted.” *Id.*

In this case, Magnolia's conduct towards Mr. Gibson was much more malicious and damaging. He suffered extreme injuries as a result of Magnolia's substandard ***16** care. Magnolia failed to take adequate measures to prevent malnutrition, dehydration, weight loss, multiple falls including one causing a fractured arm and **hemothorax**, significant delay in treating the fracture and **hemothorax**, and multiple pressure sores. Magnolia failed to provide sufficient fluids and nutrition to Mr. Gibson, thereby allowing him to become dehydrated and malnourished. Magnolia failed to provide sufficient staff to meet Mr. Gibson's most basic needs. Magnolia knowingly breached its duty to Mr. Gibson to provide adequate care, and the jury is entitled to hear and consider all evidence related to such reprehensible conduct.

The evidence in this case establishes that Magnolia was aware of the harm being caused to the nursing home residents. State surveys put Magnolia on notice of the problems. Even Magnolia's own employees put them on notice that the shortage of staff prevented them from providing adequate and appropriate care to the residents of Arnold Avenue Nursing Home. However, instead of fixing the problems, Magnolia simply sought to hide and ignore the problems.

In *Dawkins v. Redd Pest Control Co., Inc.*, 607 So.2d 1232 (Miss. 1992), the Mississippi Supreme Court said that similar incidents and complaints showed notice and intent, which could be used as evidence as to whether punitive damages were warranted. In reaching this conclusion the Court stated:

We have looked to previous occurrences to establish intentional wrong or gross negligence, and recently reversed an award of punitive damages due to the absence, among other things of any showing that the occurrence in question was so typical of the defendant's operations as to raise an inference of intentional wrongdoing.

Id. at 1236 (citations omitted).

After the jury returned a verdict of compensatory damages in favor of the Estate, the lower court correctly held an evidentiary hearing to determine whether the issue of ***17** punitive damages would be submitted to the jury. However, the lower court incorrectly held that, in light of the evidence presented at trial and at the evidentiary hearing, viewing Magnolia's conduct in the aggregate, a reasonable, hypothetical trier of fact could not find either malice or reckless disregard of the health and safety of Mr. Gibson. It was an **abuse** of discretion to preclude the jury from deciding Magnolia's liability for punitive damages liability.

During the liability phase of the trial, the Estate offered substantial evidence of Magnolia's negligence. More specifically, the Estate proved facts that established Magnolia's gross negligence and reckless disregard of Mr. Gibson. This same evidence is also relevant to, and raised a fact issue with regard to, Magnolia's liability for punitive damages.

Taken in its totality, the evidence reveals a nursing home that was dangerously short of staff and a resident, Henry C. Gibson, whose very existence depended on care from adequate staff. Mr. Gibson was not fed or given water. He was not cleaned up after episodes of incontinence. He was not turned and repositioned or given range-of-motion exercises. Staff did not ensure that fall precautions were taken to make sure that Mr. Gibson, previously identified as a fall-risk, was safe from falls. Shockingly, Mr. Gibson was left to lay in excruciating pain for several weeks after a significant traumatic event fracturing his arm and causing **hemothorax**. The result was terrible sores, contractures to the fetal position, starvation, dehydration, excruciating pain resulting from an untreated significant bone fracture and **hemothorax**, and death. A reasonable hypothetical trier of fact could find gross disregard for Mr. Gibson's rights in light of the deplorable conditions he was forced to live in such as laying in his own feces and urine, rampant staffing problems that went uncorrected, fraudulent documentation, failure to ***18** provide even the most basic needs of fluid and nutrition, and failure to timely treat a fractured arm and **hemothorax** causing Mr. Gibson to be in agonizing pain for several weeks. Magnolia was made aware of these conditions and failed to take any action to assist this totally dependent human being exhibiting disregard of human life and reckless indifference for his rights.

Even more disturbing is the fact that Magnolia was put on notice through state surveys and employee complaints of the understaffing issues prevalent at Arnold Avenue Nursing Home but in reckless disregard of its residents, did nothing to remedy the issues. Instead, Magnolia left its frail and **elderly** residents, whom depended on proper care and treatment, to fend for themselves causing them unnecessary and excruciating pain in the last years of their life.

The evidence in *Mariner Health Care, Inc. v. Edwards*, 964 So.2d 1138 (Miss. 2007) is tragically similar to that in this case. In *Edwards*, a family of a nursing home resident filed a wrongful death, negligence, medical malpractice, gross negligence, fraud, and breach of fiduciary duty complaint against the owners of a nursing home. The circuit court entered judgment on a jury verdict that found the defendants liable for the resident's death awarding the family both compensatory and punitive damages. *Id.* at 1144. After a return of a jury verdict for compensatory damages in favor of the plaintiff, the trial court properly conducted an evidentiary hearing where the following evidence was presented: testimony from nursing assistants at nursing home concerning short-staffing, expert testimony that established the nursing home's negligence in failing to monitor the resident's nutritional needs and bowel movements, failing to recommend **intravenous feeding**, and failing to transfer him to a multiple-specialty facility causing the resident's death; family observations, thoughts, and feelings about the resident's care. *Id.* at 1144- ***19** 1152.

The nursing assistants testified that they felt overwhelmed and had trouble providing competent care. *Id.* at 1150. Several of them testified that understaffing prevented them from turning the resident as often as was necessary to prevent **bedsores**. One nursing assistant testified that she was not able to change the resident as often as she would have because of short-staffing. All of them testified that they witnessed the resident's deterioration. *Id.* "The trial judge heard the evidence presented during the compensatory damages phase of the trial and determined that consideration of punitive damages was appropriate." *Id.* at 1149. The cause here requires the same result.

Similarly, in *Johnson v. Mariner Health Care, Inc.*, 2008 WL 2037749 (S.D. Miss.), another nursing home negligence case, a defendant nursing home sought partial summary judgment on the issue of punitive damages. The resident plaintiff submitted evidence showing:

[A] pattern of poor care and neglect, including repeated failure to provide the most basic care to keep [the resident] clean and reasonably comfortable and to provide him with food and water, repeated failure to provide necessary preventative care, repeated failure to instruct the direct care workers on his treatment orders and the assistance he needed, repeated failure to promptly report changes in his condition to his doctors and to implement recommended changes in treatment, and a repeated slow response to demands from his family that he receive prompt treatment.

Id. at *1. The defendant nursing home claimed that the evidence did not rise to the level of willful, wanton or malicious conduct. Disagreeing with the defendant's position and taking the evidence in the light most favorable to the plaintiffs, the court found that the punitive damages claim should not be dismissed on summary judgment. *Id.* Certainly, if the evidence of short-staffing, repeated failure to provide care to a nursing home resident, and a pattern of poor care and neglect causing injury can present a genuine issue of fact for punitive damage liability, it too can be used by a reasonable, hypothetical trier of fact to *20 find either malice or gross neglect and reckless disregard. *See also First Healthcare Corporation v. Hamilton*, 740 So.2d 1189 (Fla. 4th DCA 1999)(evidence was sufficient for a jury to award punitive damages when the defendant nursing home was aware that a resident needed close supervision due to wandering but did nothing to keep him safe ultimately causing him injury and death); *Youngblood vs. Halifax Convalescent Center, Ltd., et al.*, 874 So. 2d 596, 606 (Fla. 5th DCA 2004) (evidence of understaffing and expert nursing testimony that the care provided to the resident established the resident's right to punitive damages).

Evidence identical to that introduced by the Estate has consistently supported significant awards of punitive damages. For example, in *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark 2003), cert. denied, 540 U.S. 1012 (2003), the plaintiffs theory of liability was simple and similar to that advanced by the plaintiff in this case. The Sauer plaintiff asserted that the nursing-home conglomerate that owned the facility placed profit over quality care and caused injury to Mrs. Sauer including her death. This theory was supported by evidence of short staffing, altering medical records, “staffing up” during government inspections (called surveys) *Id.* at 354 and, perhaps most importantly, the testimony of a former vice president who described a “change in corporate philosophy in 1996 stressing profits over care.” *Id.* at 352, 354.

Likewise, in *Miller v. Levering Regional Health Center*, ED 86933 (Mo. Ct. App. July 11, 2006), the Missouri Court of Appeals just recently upheld a punitive verdict against a residential facility where **elderly**, mentally ill Ocie Birkhead died due to the facility's failure to monitor her condition after she fell and hit her head. Central to the plaintiffs theory of recovery was the fact that the facility was understaffed. Ocie Birkhead was left unattended until she had vomited on herself and suffered an *21 irreparable hemorrhage that killed her. The Missouri Court of Appeals correctly referred to this conduct as reprehensible.

Magnolia operated Arnold Avenue Nursing Home in a manner which indicated its reckless and gross negligence in the care of residents, including Mr. Gibson. Certainly, the evidence in this case mirrors the requirements of §11-1-65 and constitutes a perfect example of why Mississippi Legislature enacted the punitive damages statute in the first place. Magnolia committed gross negligence and willful conduct in reckless disregard of Mr. Gibson, warranting the submission of the issue of punitive damages to the jury. Accordingly, the lower court's determination to preclude the submission of the issue of punitive damages to the jury was an **abuse** of discretion and must be reversed.

2. The Cap on Non-Economic Damages Set Forth in Miss. Code Ann. § 11-1-60 (2) Violates the Estate's Rights under the Mississippi Constitution

a. The Cap Clearly Violates the Estate's Right to a Trial by Jury

Mississippi Code § 11-1-60 (2) provides for a reduction of non-economic damages to a sum of \$500,000 for any cause of action for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm. In so doing, statute removes the decision as to the amount of non-economic damages awarded to a litigant away from

the jurors and, therefore, this statute cannot be reconciled with a litigant's right to a trial by jury as provided by the Mississippi Constitution and by the United States Constitution.

The Mississippi Constitution plainly states that the right to trial by jury shall remain inviolate.” [Miss. Const., Art. 3, §. 31](#). The United States Constitution ([U.S. Const., Amendment 7](#)) also guarantees the right to a jury trial. The term “inviolable” connotes deserving of the highest protection. “Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has *22 always been.” [Sofie v. Fibreboard Corp.](#), 771 P.2d 711, 656 (Wash. 1989). The right to a jury trial includes a decision by the jury to determine the size of a damage award in a tort case. *See, e.g., Lewis v. Hiatt*, 683 So.2d 937, 941 (“[I]t is primarily the province of the jury to determine the amount of damages to be awarded”); [Thompson v. Dung Thi Hoang Nguyen](#), -- So.3d.--, 2002 WL 34591654 (Miss. App. 2011) (“It is the jury [that] determines the weight of the testimony and the credibility of the witnesses at trial [,] and it is the primary province of the jury to determine the amount of damages to award”); [Dimick v. Schiedt](#), 293 U.S. 474, 480, 55 S.Ct. 296, 79 L.Ed.603 (1935). A plaintiff “remain[s] entitled ... to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.” [Dimick v. Schiedt](#), 293 U.S. 474, 486(1935).

Removing this decision from the jury would fail “to preserve the substance of the common-law right of trial by jury,” as required by the Constitution. The amount of damages due to a tort litigant for pain and suffering is a factual determination which cannot be determined as a matter of law. [Cooper Indus., Inc. v. Leatherman Tool Group, Inc.](#), 532 U.S. 427, 437 (2001); Charles T. McCormick, *Handbook on the Law of Damages* § 6, p. 24 (1935). Hence, “[t]he right to a jury trial includes the right to have a jury determine the amount of... damages, if any awarded to the [plaintiff].” [Feltner v. Columbia Pictures Television, Inc.](#), 523 U.S. 340, 355, 118 S. Ct. 1279, 140 L.Ed. 2d 438 (1998).

[Miss. Code Ann. § 11-1-60](#) (2) infringes on this right. By requiring the court to reduce a non-economic damages award determined by a jury that exceeds the statutory limit, the statute clearly nullifies the jury's findings of facts regarding damages and thereby undermines the jury's basic function. This statutory provision operates unconstitutionally in that it deprives a tort litigant, such as Mr. Gibson, his constitutional right to have a jury *23 determine the amount of damages in his case. *See Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (1999) (“to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect.”) [Miss. Code Ann. § 11-1-60](#) (2) subverts the jury's crucial role in assessing damages and subjects any determination to the court for a pre-established reduction. It applies to every case, regardless of the amount of pain and suffering a victim has endured and the evidence presented².

As such, the application of [Miss. Code Ann. § 11-1-60](#) (2) conflicts with the well-established principle in this state that, in a case in which a right to jury trial exists, litigants have the constitutional right to have all questions of fact passed on by a jury, and a legislative denial of that right is unconstitutional. *See Lakin*, 987 P.2d at 475 (non-economic damages caps violate right to trial by jury); [Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt](#), 691 S.E.2d 218 (Ga. 2010) (statute limiting awards of noneconomic damages in medical malpractice cases to predetermined amount violated state constitutional right to a jury trial); [Moore v. Mobile Infirmary Assn.](#), 592 So.2d 156 (Ala. 1991) (same); [Sofie v. Fibreboard Corp.](#), 771 P.2d 711 (Wash. 1989) (same); [Smith v. Department of Ins.](#), 507 So.2d 1080 (Fla. 1987) (plaintiff does not receive constitutional benefit of jury trial where jury verdict arbitrarily capped). “[I]f the legislature may constitutionally cap recovery at [\$500,000], there is no discernible reason why it could not cap the recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1.” *Id.* at 1089. “The very existence of the caps, in any amount, is violative of the right to trial by jury.” [Nestlehutt](#), 691 S.E.2d at 223.

*24 Although the Legislature has authority to modify or abrogate the common law, this general authority does not empower the Legislature to abrogate vital constitutional rights that may inhere in common law causes of action. *See Dimick*, 293 U.S. at 473 (“To effectuate any change in [common law rules embodies in right to jury trial] is not to deal with the common law, *qua* common law, but to alter the Constitution.”) The Legislature cannot be permitted to exceed its authority by removing a litigant's constitutional right to a jury trial.

The cap on non-economic damages is unconstitutional in its application as it strips a litigant's right to a trial by jury, including an assessment of the amount of damages in light of the evidence presented at a trial. Consequently, this Court should be compelled to conclude that the caps infringe on a litigant's constitutional right, as embodied in the Mississippi Constitution, and in the United States Constitution to a jury determination as to non-economic damages.

b. The Cap Clearly Violates the Separation of Powers Clauses of the Mississippi Constitution

The Mississippi Constitution sets forth three separate and distinct branches of government; legislative, executive, and judicial. [Miss. Const. Art. I, § 1](#). The following Section states that “[n]o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belong to either of the others.” [Miss. Const. Art. 1, § 2](#). The separation of powers doctrine “ensures that coequal branches do not encroach on the power of others. [Alexander v. State By and Through Allain](#), 441 So.2d 1329, 1335-36 (Miss. 1983).

Officers and departments are forbidden from performing a function properly belonging to either of the other two departments. This Court holds “firm to the principle that *25 Mississippi's legislative branch of government, may not, through procedural legislation, control the function of the judiciary.” [Magyar v. State](#), 18 So.3d 807, 810 (Miss. 2009). “Stated another way, this Court cannot-consistent with the Mississippi Constitution - relinquish to the Legislature the duties and powers constitutionally imposed upon the Supreme Court.” *Id.* at 810- 11. A determination of the amount of damages is a judicial power exclusively belonging to the courts and juries. [Isom v. Mississippi Cent. R. Co.](#), 36 Miss. 300, 315, 1858 WL 3114 (Miss. Err. & App. 1858)(the ascertainment of the amount of damages is a judicial and not a legislative act).

[Miss. Code Ann. § 11-1-60](#) (2) is unconstitutional in its operation as it allows the legislature to perform a function that is exclusively within the judicial branch. It allows the legislature to set a pre-established maximum value of the amount a tort victim can ever recover at trial without regard to the facts or evidence. The statute impermissibly undercuts the authority of the judiciary and judicial process.

Additionally, the statute is unconstitutional in that it invades the power of the judiciary to alter excessive and insufficient jury awards. Mississippi Courts are constitutionally empowered, and indeed obligated, to reduce excessive awards and to increase insufficient awards when the verdict is “excessive or inadequate for the reason that the jury or trier of facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.” [Miss. Code Ann. § 11-1-55](#). The statute setting forth the caps completely usurps the judiciary's power of remittitur and additur by establishing a mandatory, arbitrary legislative remittitur.

The Illinois Supreme Court found a statutory non-economic damages cap unconstitutional for interference with the traditional remittitur power of the judiciary:

[W]e conclude that [the statute] undercuts the power, and obligation, of the judiciary to reduce excessive verdicts. In our view, [the statute] functions as *26 a “legislative remittitur.” Unlike the traditional remittitur power of the judiciary, the legislative remittitur of [the statute] disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiffs non-economic injuries. Therefore, [the statute] unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

[Best v. Taylor Mach. Works](#), 689 N.E.2d. 1057, 1080 (Ill. 1997). See also *Sofie*, 771 P.2d at 770 (the statutory damages cap violated the separation of powers doctrine due to the “legislative attempt to mandate legal conclusions.” “[T]he [statutory damages] limit may, indeed, violate the separation of powers.”)

The legislature has completely seized the judiciary's exclusive power to review a jury verdict and remit damages where needed based upon the evidence presented at trial. This type of consideration is left solely to the judiciary. The statute capping non-economic damages removes this from the court's discretion and power and mandates an automatic remittitur. The statute amounts to an unconstitutional encroachment on the functions of the judiciary and violates the separation of powers clause of the Mississippi Constitution.

Finally, through the statute, the Legislature attempts to control the judiciary during a trial. The legislature cannot command the court to perform an action during litigation any more than the court can dictate actions to the legislature. See, e.g., [Jones v. City of Ridgeland](#), 48 So.3d 530, 536-37 (Miss. 2010) (“We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.”)

For these reasons, the statutory cap on non-economic damages set forth in [Miss. Code Ann. § 11-1-60](#) (2) is unconstitutional on its face and in its operation. Accordingly, this Court should reinstate the jury's verdict for the full amount.

***27 Conclusion**

Henry C. Gibson starved slowly and wasted away in agony while in Magnolia's care. Magnolia knew he needed care and lacked the staff to provide him with such care. Magnolia ignored the deplorable conditions at Arnold Avenue Nursing Home and forced the frail and **elderly** Mr. Gibson to fend for himself. The reprehensible facts of this case require that the issue of punitive damages be submitted to the jury pursuant to [Miss. Code Ann. § 11-1-65](#). Therefore, the instant case should be remanded for a hearing on punitive damages before the lower court.

Moreover, the statutory cap on non-economic damages set forth in [Miss. Code Ann. § 11-1-60](#) (2) is unconstitutional on its face and in its operation. Accordingly, this Court should reinstate the jury's verdict in the full amount.

Appendix not available.

Footnotes

- 1 References to the record are denoted as R.____. References to the excerpts of the record are denoted as R.E.____. References to the transcript of the proceedings are denoted as T.____.
- 2 Notably, [Miss. Code Ann. § 11-1-60](#) (2)(a) discriminates against causes of action for injuries based upon malpractice or breach of standard of care against a provider of healthcare, including institutions for the aged or infirm, by limiting non-economic recovery to \$500,000. Any other cause of action is limited to \$1,000,000.00 in non-economic damages. [Miss. Code Ann. § 11-1-60](#) (2)(b). Certainly, this type of disparate treatment also violates Mr. Gibson's right to equal protection under the Mississippi Constitution and the United States Constitution.